

(4)
No. 91-1729

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

v.

STATE OF TEXAS AND
TEXAS DEPARTMENT OF HUMAN RESOURCES

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

JOINT APPENDIX

DAN MORALES
Attorney General of Texas
JAMES C. TODD
EDWIN N. HORNE
P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Counsel for Respondents

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Petitioners

PETITION FOR WRIT OF CERTIORARI FILED: APRIL 27, 1992
CERTIORARI GRANTED: OCTOBER 5, 1992

BEST AVAILABLE COPY

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**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

A. United States District Court for the
Western District of Texas
Case No. 88-CV-820

STATE OF TEXAS, ET AL.

v.

UNITED STATES, ET AL.

No. 88-CV-820 (W.D. Tex.)

DATE		PROCEEDINGS
10/7/88	1	Complaint filed and 2 summons(es) issued (mm) [Entry date 10/14/88] * * *
5/30/89	10	Order that the instant action is consolidated with A-87-CA-774 . . . and that A-88-CA-820 is hereby transferred to the Docket of the Honorable James R. Nowlin, and set scheduling order deadlines * * *
11/13/90	—	Order granting defendants' motion for summary judgment and further ORDERED that the State of Texas pay prjudgment [sic] interest on the amount owed to the federal government in this cause. (mcl) [Entry date 11/15/90]

DATE	PROCEEDINGS
11/13/90	— Judgment for The United States against State of Texas. Further, that the State of Texas pay prejudgment interest on the amount owed to the federal government under the Food Stamp Program for mail lossess [sic] above the tolerance level of 0.5% (mcl) [Entry date 11/15/90]

* * * *

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

B. United States District Court for the
Western District of Texas
Case No. 87-CV-774

STATE OF TEXAS, ET AL.

v.

UNITED STATES, ET AL.

No. 87-CV-774 (W.D. Tex.)

DATE	PROCEEDINGS
11/16/87	1 Complaint filed and summonses issued. (mn) [Entry date 11/23/87]
	* * *
05/30/89	18 Order that the instant action (A-88-CA-820) is consolidated with A-87-CA-774 and that the scheduling deadlines applicable to A-87-CA-774 are adopted to apply to the consolidated action. (mz)
	* * *
11/8/89	22 Motion by USA for summary judgment (pm) [Entry date 11/09/89]
	* * *
11/13/90	49 Order granting motion for summary judgment, and further ORDERED that the State of Texas pay prejudgment interest on the amount owed to the federal government in this cause. [22-1] (mcl) [Entry date 11/15/90]

DATE	PROCEEDINGS
11/13/90 50	Judgment for USA against State of Texas. "ACCORDINGLY, IT IS ORDERED that the defendant's motion for summary judgment is hereby granted; and further ORDERED that the State of Texas pay prejudgment interest on the amount owed to the federal government under the Food Stamp Program for mail losses above the tolerance level of 0.5%. (mcl) [Entry date 11/15/90]
	* * * *
1/8/91 51	Notice of appeal by Marlin W. Johnson, T.D.H.S., State of Texas (mcl) [Entry date 01/09/91]
	* * * *

**CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES**

C. United States Court of Appeals
for the Fifth Circuit
Case No. 91-8042

STATE OF TEXAS, ET AL.,
PLAINTIFFS-APPELLANTS

v.

UNITED STATES, ET AL.,
DEFENDANTS-APPELLEES

DATE	PROCEEDINGS
1/18/81	Record on Appeal
	* * * *
10/7/91	Case Argued * * *
	* * * *
01/28/92	Opinion Rendered
	* * * *
01/28/92	Flg. & Entg. Judgment
	* * * *
2/27/92	Jdgt. as Mdt. Issd. to Clerk
	* * * *

[SEAL]

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE

SOUTHWEST REGION
1100 Commerce Street
Dallas, TX 75242

*CERTIFIED MAIL—
RETURN RECEIPT REQUESTED*

Feb. 25, 1987

Mr. Marlin Johnston, Commissioner
Texas Department of Human Services *FIRST DEMAND*
P.O. Box 2960—520 W.
Austin, Texas 78769

Dear Mr. Johnston:

Subject: Family Nutrition Programs—First Demand for
Payment of Third and Fourth Quarter (April-
September 1986) Fiscal Year 1986 Liabilities
for Mail Issuance Tolerance Levels.

Based on tolerance levels specified in 7 CFR 274.3(c)(4)
of the Food Stamp Program regulations dated April 8,
1983, a claim of \$150,350 is established against the Texas
Department of Human Services. This liability is com-
puted as follows:

Third Quarter (April-June 1986)		Fourth Quarter (July-September 1986)	
Cameron County	\$ 4,805	Atascosa County	\$ 757
Dallas County	2,219	Brazos County	147
Gregg County	3,489	Caldwell County	1,058
Harris County	5,707	Calhoun County	1,072
Hidalgo County	1,844	Comal County	35
Howard County	200	Crosby County	2,071
Jefferson County	482	Dallas County	19,452
Midland County	175	Dawson County	520
Navarro County	1,749	Denton County	1,274
Starr County	13,512	Dimmit County	4,797
	\$34,182	El Paso County	4,618

Floyd County	2,104
Galveston County	2,086
Gregg County	11,658
Guadalupe County	756
Hale County	7,416
Hardin County	1,714
Harris County	11,227
Hays County	2,392
Hidalgo County	3,387
Hockley County	2,607
Howard County	39
Jackson County	519
Jasper County	361
Jefferson County	664
Johnson County	754
Kaufman County	652
Lamb County	53
Lubbock County	3,894
Maverick County	3,601
Medina County	830
Midland County	3,214
Newton County	970
Nueces County	1,986
Orange County	1,289
Parker County	483
Parmer County	2,116
Reeves County	2,090
San Patricio County	68
Shelby County	266
Tarrant County	1,895
Terry County	1,547
Victoria County	3,039
Washington County	1,886
Zavala County	2,804
	\$116,168

Payment is due March 27, 1987. Based on TFRM 6-8000,
Section 8020, Title 4 CFR 102.11, interest will be charged
at 7.625 percent per annum starting March 28, 1987, on
any amount of this claim for which payment has not
been received by that date.

This claim may be satisfied by cash payment or letter of
credit offset. Any questions concerning the procedure
for repayment should be directed to me at (214) 767-
0232.

In accordance with 7 CFR 276.1(b) of the Food Stamp Program regulations, your agency has the right to appeal any claim brought against you by the Food and Nutrition Service. If you choose to contest the claim, in accordance with 7 CFR 276.7(c) of the Food Stamp Program regulations, you must file an appeal with the Executive Secretary, State Food Stamp Appeals Board, within ten days of the date you receive this letter.

Interest at the established rate of 7.625 percent per annum will accrue during the appeal process on any amount of this claim that is sustained by the appeals Review Board. The address of the Appeals Review Board is:

U.S. Department of Agriculture
Appeals Review Board
3101 Park Center Drive, Suite 304
Alexandria, Virginia 22302

If you plan to appeal, please forward a copy of your notice of intent to appeal within ten days of the date you receive this letter to Regional Director, Family Nutrition Programs, Food and Nutrition Service, United States Department of Agriculture, 1100 Commerce Street, Room 5-C-30, Dallas, Texas 75242.

Sincerely,

/s/ Ronald J. Rhodes
RONALD J. RHODES
Regional Director
Family Nutrition Programs

Enclosure

[SEAL]

UNITED STATES DEPARTMENT OF AGRICULTURE
FOOD AND NUTRITION SERVICE

SOUTHWEST REGION
1100 Commerce Street
Dallas, TX 75242

May 27, 1987

*CERTIFIED MAIL—
RETURN RECEIPT REQUESTED*

FIRST DEMAND

Mr. Marlin Johnston, Commissioner
Texas Department of Human Services
P.O. Box 2960—520 W.
Austin, Texas 78769

Dear Mr. Johnston:

Subject: Family Nutrition Programs—First Demand for
Payment of First and Second Quarter (October
1986-March 1987) Fiscal Year 1987 Liabilities
for Mail Issuance Tolerance Levels.

Based on tolerance levels specified in 7 CFR 274.3(c) (4) of the Food Stamp Program regulations dated April 8, 1983, a claim of \$262,035 is established against the Texas Department of Human Services. This liability is computed as follows:

First Quarter (October-December 1986)		Second Quarter (January-March 1987)	
Bee	\$ 789	Brazos	\$ 239
Brazos	2,570	Brewster	452
Cameron	6,298	Collin	1,994
Collin	1,521	Dallas	23,765
Comal	490	Dawson	698
Dallas	7,894	Denton	584
Denton	1,243	Ellis	1,546
Ector	3,018	El Paso	26,323
Ellis	2,674	Freestone	52
El Paso	9,934	Galveston	882
Galveston	1,276	Gregg	23,368
Gregg	37,887	Hale	1,605

Grimes	1,212	Harris	10,802
Guadalupe	700	Hays	1,433
Hale	202	Hidalgo	2,003
Harris	14,838	Hill	2,060
Hays	805	Hockley	137
Hidalgo	9,784	Jefferson	788
Howard	1,314	Midland	8,610
Hunt	694	Milam	1,192
Johnson	1,363	Potter	178
Lamb	457	Shelby	283
Liberty	2,358	Tarrant	1,329
Limestone	916	Terry	854
Lubbock	2,144	Travis	1,897
Medina	2,272	Walker	527
Midland	5,745		
Navarro	2,507		
Nueces	7,132		
Red River	189		
Reeves	581		
Starr	5,477		
Tarrant	4,832		
Terry	1,891		
Travis	251		
Victoria	1,510		
Washington	3,666		

Payment is due June 26, 1987. Based on TFRM 6-8000, Section 8020, Title 4 CFR 102.11, interest will be charged at 7.625 percent per annum starting June 27, 1987 on any amount of this claim for which payment has not been received by that date.

This claim may be satisfied by cash payment or letter of credit offset. Any questions concerning the procedure for repayment should be directed to me at (214) 767-0232.

In accordance with 7 CFR 276.1(b) of the Food Stamp Program regulations, your agency has the right to appeal any claim brought against you by the Food and Nutrition Service. If you choose to contest the claim, in accordance with 7 CFR 276.7(c) of the Food Stamp Program regulations, you must file an appeal with the Executive Secretary, State Food Stamp Appeals Board, within ten days of the date you receive this letter.

Interest at the established rate of 7.625 percent per annum will accrue during the appeal process on any amount of this claim that is sustained by the Appeals Review Board. The address of the Appeals Review Board is:

U.S. Department of Agriculture
Appeals Review Board
3101 Park Center Drive, Suite 304
Alexandria, Virginia 22302

If you plan to appeal, please forward a copy of your notice of intent to appeal within ten days of the date you receive this letter to Regional Director, Family Nutrition Programs, Food and Nutrition Service, United States Department of Agriculture, 1100 Commerce Street, Room 5-C-30, Dallas, Texas 75242.

Sincerely,

/s/ Ronald J. Rhodes
RONALD J. RHODES
Regional Director
Family Nutrition Programs

Enclosure

[SEAL]

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
Washington, D.C. 20250

Oct. 13, 1987

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

Mr. Marlin W. Johnston
Commissioner
Texas Dept. of Human Services
John H. Winters Human Services Ctr.
701 West 51st St.
P.O. Box 2960
Austin, Texas 78769

Re: State Food Stamp Appeals Board
Administrative Review No. 17-87

Dear Mr. Johnston:

This Administrative Review concerns a determination by the Food and Nutrition Service, U.S. Department of Agriculture, that the State of Texas is liable to this Department for \$150,350 for the third and fourth quarters of Fiscal Year 1986. The liability is based on the State exceeding allowable tolerance levels for mail issuance losses as provided in 7CFR 274.3(c)(4).

The record on this matter consists of the State of Texas' appeal dated March 11, 1987, supplemental material submitted by the State, file documents from the Food and Nutrition Service and the record of the hearing held July 13, 1987.

In its appeal the State of Texas disputes the underlying assumptions on which tolerance levels have been established for mail issuance losses. Further, the State maintains that if there is any loss it has not been allocated properly. The State also contends that it should not be held liable for mail issuance losses resulting from theft by U.S. Postal Service employees.

After a thorough review of all the material presented and the hearing record, it is the opinion of the Board that the State of Texas is liable to the Food and Nutrition Service for \$150,350. The regulatory provisions found in 7CFR 274.3(c)(4) are clear. The Food and Nutrition Service acted in accordance with its authority when it billed the State for exceeding the tolerance levels specified.

It seems readily apparent to the Board that the regulations in effect during the time period covered by this appeal are sufficient and clear in stipulating the requirements for issuance of food coupons, the methods for determining losses and the penalties for exceeding loss tolerance. The fact that tolerances are set suggests a willingness on the part of the Food and Nutrition Service to waive, in advance, some program losses regardless of who is responsible.

The Board recognizes and commends the State for its efforts to cooperate with the U.S. Postal Service in addressing and minimizing the mail issuance losses resulting from thefts attributable to Postal Service employees. However, the Board believes these efforts were no greater than are to be expected of a State when carrying out the regulatory provisions for mail issuance of food stamps. As provided in 7CFR 274.2 options other than mail issuance were available to the State, if the State determined its mail issuance performance to be unsatisfactory.

The determination of the Board is final and not subject to reconsideration. It shall take effect 30 days after delivery to the State of Texas. Should the State of Texas be aggrieved by this final determination, it may seek judicial review and trial *de novo* by filing a complaint against the United States in a court of competent jurisdiction within 30 days after delivery of this letter.

Sincerely,

/s/ Orval Kerchner
ORVAL KERCHNER,
Chairman
State Food Stamp Appeals Board

[SEAL]

DEPARTMENT OF AGRICULTURE
OFFICE OF THE SECRETARY
Washington, D.C. 20250

Sep. 12, 1988

CERTIFIED MAIL—Return Receipt Requested

Mr. Marlin W. Johnston
Texas Dept. of Human Services
John H. Winters Human Services Center
701 West 51st Street
P.O. Box 2960
Austin, Texas 78769

Re: State Food Stamp Appeals Board
Administrative Review No. 23-87

Dear Mr. Johnston:

This Administrative Review concerns a determination by the Food and Nutrition Service, U.S. Department of Agriculture, that the State of Texas is liable to this Department for \$262,035 for the period October 1986 through March 1987. The liability is based on the State exceeding allowable tolerance levels for mail issuance losses as provided in 7 C.F.R. 274.3(c)(4).

The record on this matter consists of the State of Texas' appeal dated June 2, 1987, supplemental material submitted by the State, file documents from the Food and Nutrition Service and the record of the hearing held January 7, 1988.

In its appeal the State of Texas disputes the underlying assumptions on which tolerance levels have been established for mail issuance losses. Further, the State maintains that if there is any loss it has not been allocated properly. The State also contends that it should not be held liable for mail issuance losses resulting from theft by U.S. Postal Service employees.

After a thorough review of all the material presented and the hearing record, it is the opinion of this Board that the State of Texas is liable to the Food and Nutrition Service for \$262,035. The regulatory provisions found in 7 C.F.R. 274.3(c)(4) are clear. The Food and Nutrition Service acted in accordance with its authority when it billed the State for exceeding the tolerance levels specified.

It seems readily apparent to the Board that the regulations in effect during the time period covered by this appeal are sufficient and clear in stipulating the requirements for issuance of food coupons, the methods for determining losses and the penalties for exceeding loss tolerance. The fact that tolerances are set suggests a willingness on the part of the Food and Nutrition Service to waive, in advance, some program losses regardless of who is responsible.

The Board's reading of the mail issuance regulations leaves the clear understanding that the States are to share a portion of mail issuance losses, without respect to the cause of the loss. Therefore, a waiver of the State of Texas' liability and requiring the FNS to bear the entire amount of the mail issuance loss would be contrary to the intent and purpose of the regulations.

The Board recognizes and commends the State for its efforts to cooperate with the U.S. Postal Service in addressing and minimizing the mail issuance losses resulting from thefts attributable to Postal Service employees. However, the Board believes these efforts were no greater than are to be expected of a State when carrying out the regulatory provisions for mail issuance of food stamps. As provided in 7 C.F.R. 274.2 options other than mail issuance were available to the State, if the State determined its mail issuance performance to be unsatisfactory.

The determination of the Board is final and not subject to reconsideration. It shall take effect 30 days after delivery

to the State of Texas. Should the State of Texas be aggrieved by this final determination, it may seek judicial review and trial *de novo* by filing a complaint against the United States in a court of competent jurisdiction within 30 days after delivery of this letter.

Sincerely,

/s/ Orval Kerchner
ORVAL KERCHNER
Chairman
State Food Stamp Appeals Board

SUPREME COURT OF THE UNITED STATES

No. 91-1729

UNITED STATES, ET AL., PETITIONERS

v.

TEXAS, ET AL.

ORDER ALLOWING CERTIORARI

Filed October 5, 1992

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

October 5, 1992